based upon an earlier California case[3] which held that the rule for damages for breach of a charter party is the same as for personal services, being the amount agreed upon for the service less expenses incurred in rendering it and any profits that might have been earned by the exercise of reasonable diligence during the time required for performing the stipulated service. The damages would therefore be an unliquidated sum and there would be no implied contract for the direct payment of money.[4]

This decision is of particular importance to shippers and shipowners. If a suit is brought in admiralty for breach of charter party when no cargo or only part of the cargo is furnished or when a ship is not provided at the agreed time and place, there is no maritime lien,[5] hence there can be no proceeding *in rem* against cargo or ship. If, on the other hand, the injured party chooses to sue *in personam* in admiralty he cannot attach the property of the defendant if the latter can be found within the jurisdiction.[6] It follows, then, that if suit be brought in admiralty and the defendant is served with summons within the jurisdiction, no security for the judgment can be obtained. The decision in the principal case leaves the plaintiff in the same position when suit is brought in the state court. Shipping men, take notice. *L. E. K.*

CONFLICT OF LAWS: RECOVERY UNDER THE WORKMEN'S COMPENSATION ACT FOR INJURIES SUSTAINED ABROAD—Within the past few years the question of a right of recovery under the Workmen's Compensation Act for injuries received abroad has frequently challenged the attention of the courts of this country. The earlier tendency was to hold the Act strictly territorial, and to limit its operation to intrastate injuries only.[1] But the later trend has been distinctly away from the strictly territorial theory and today recovery is generally permitted for injuries suffered abroad.[2]

This question has just been met squarely under the California

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[3] Utter v. Chapman (1869) 38 Cal. 659, (1872) 43 Cal. 279.

[4] Willett v. Alpert (Dec. 8, 1919) 58 Cal. Dec. 523, 185 Pac. 976; 8 California Law Review, 251.

[5] Schooner Freeman v. Buckingham (1855) 59 U. S. (18 How.) 182, 188, 15 L. Ed. 341; Vandewater v. Mills (1856) 60 U. S. (19 How.) 82, 15 L. Ed. 554, 24 R. C. L. 1313; The Saturnus (1918) 250 Fed. 407, 162 C. C. A. 477, 3 A. L. R. 1187 and cases there cited; 70 L. R. A. 373, 433, and cases there cited.

[6] Munro v. Almeida (1825) 23 U. S. (10 Wheat.) 473, 6 L. Ed. 369; Smith v. Miln (1848) Fed. Cas. No. 13081; The Horsa (1915) 232 Fed. 993; 1 C. J. 1301 and cases there cited.

[1] In re Gould (1913) 215 Mass. 480, 102 N. E. 693.

[2] Kennerson v. Thames Towboat Co. (1915) 89 Conn. 367, 94 Atl. 372; Rounsaville v. Central R. Co. (1915) 87 N. J. L. 371, 94 Atl. 392; Grinnell v. Wilkinson (1916) 39 R. I. 447, 98 Atl. 103; Gooding v. Ott (1916) 77 W. Va. 487, 87 S. E. 862; Post v. Burger (1916) 216 N. Y. 544, 111 N. E. 351; Pierce v. Bekins Van & Storage Co. (1919, Iowa) 172 N. W. 191. See note in 30 Yale Law Journal, 71 (Nov., 1920).

law, for the first time,[3] in *Quong Ham Wah v. Industrial Accident Commission*[4] in its second hearing. On the first hearing of the case,[5] the court held section 58 of the Workmen's Compensation Act[6] unconstitutional on the grounds of being unlawfully discriminatory against citizens of other states and did not, therefore, expressly decide the question of a right to recover under the Act for injuries abroad. On the second hearing, however, the court changed its position as to the constitutionality of the section and went squarely on record in favor of a right to compensation for injuries received abroad under a contract of hire made within the state.

Our law recognizes, as a fundamental principle, that the power of each sovereign extends only to his territorial boundaries.[7] The principal case expressly repudiates the idea that the California Compensation Act attempts to create rights abroad. In saying that the Act has an extraterritorial effect, loosely speaking, the court says: "it can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this state."

On what grounds can such a right be supported? This necessarily involves a determination of the nature of the obligation created by the Act. The courts have apparently felt impelled to classify the obligation as either contract or tort. Some have held that compensation acts, though not strictly delictual, were designed partially to supersede a particular branch of the law of torts, and are co-extensive in their territorial application with the laws thus superseded. The rule of conflict of laws applicable to torts generally is therefore invoked, and the acts held to have a strictly territorial operation only.[8] The prevailing theory, however, is that the obligation created by such an act rests on "contract."[9] The provisions of the Act enter into the terms of the contract of hiring and regardless of where the accident occurs compensation is recov-

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[3] The question was presented previously in North Alaska Salmon Co. v. Pillsbury (1916) 174 Cal. 1, 162 Pac. 94, L. R. A. 1917E 642, 31 Ann. Cas. 515, but was not expressly decided. The court assumed that the legislature had such a power but that case went off on a matter of statutory interpretation and the act, as originally exacted, was held not to authorize recovery for extraterritorial injury.

[4] (Oct. 5, 1920) 60 Cal. Dec. 384, 192 Pac. 1021.

[5] (Dec. 26, 1919) 59 Cal. Dec. 18.

[6] Workmen's Compensation Act, § 58 (Cal. Stats. 1917, ch. 586). "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

[7] Erie R. R. v. Pennsylvania (1893) 153 U. S. 628, 38 L. Ed. 846, 14 Sup Ct. Rep. 952.

[8] In re Gould, supra, n. 1.

[9] Supra, n. 2.

erable in the state where the contract was made, being purely a discharge of a contract obligation.[10]

The principal case rejects both the territorial rule and the contract theory. The Act does not create a tort liability. The modern theory of the law of torts is predicated on fault, whereas compensation rights and obligations have no reference to the negligence or wilful fault of the employer.[11] Nor is it contractual in a strict sense. The contract theory may perhaps fit those optional acts, where the application of the act is made optional either on the part of the employer or the employee. But the California Act is compulsory. The liability to pay compensation does not rest on the mutual agreement of the parties; it arises from the law itself.[12] The principal case decided that the obligation created by the Act is a "law-imposed liability, in a class by itself, being neither strictly contractual nor delictual."[13]

It would appear that the courts have needlessly exercised themselves in persistently classifying all obligations under the old divisions of contract and tort. Those abstract hard and fast categories have become inadequate and a more flexible conception is needed that will actually fit conditions as they are. To be sure, the relation of employer and employee is contractual in its inception. But to the relation which the contract creates the law automatically attaches certain duties and the same law which imposes the duty defines its orbit and its measure.[14] In its workings, then, this relation is akin to status. The very nature of the relation, by law, imposes certain duties and liabilities on the employer. One of these duties obliges the employer to pay compensation to the injured employee, according to the terms of the act.

The obligation being statutory, one should not place too much reliance upon the rules of conflict of laws relating to contracts and torts. The question of the right to recover for injuries suffered abroad is purely a question of legislative power. And it can be sup-

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[10] Pierce v. Bekins Van & Storage Co., supra, n. 2.

[11] North Alaska Salmon Co. v. Pillsbury, supra, n. 3; Jeremiah Smith, Tort and Absolute Liability—Suggested Changes in Classification, 30 Harvard Law Review 241, 319. The modern theory in France is in accord. See Charmont, Les Transformations du Droit Civil, ch. XV, pp. 233-254.

[12] No distinction was made between the optional and the compulsory statutes in applying the contract theory in Post v. Burger (1916) 216 N. Y. 544, 111 N. E. 351. But the Court of Appeals of New York has subsequently recognized that the contract theory does not strictly fit the New York Act, which is compulsory, and cannot be said to rest on contract. Barnhart v. American Concrete and Steel Co. (1920) 227 N. Y. 531, 125 N. E. 675.

[13] The court, in the principal case, states that for want of a better term the obligation might be called quasi-contractural. Cardoza, J., in Smith v. Heine Boiler Co. post n. 14, says the same. See also Steamship Co. v. Jollife (1864) 69 U. S. (2 Wall.) 450, 17 L. Ed. 805. It is submitted that a statutory obligation is a different thing from quasi-contract and the classification of rights and obligations properly should be fourfold, viz., contract, tort, quasi-contract, statutory obligation.

[14] Smith v. Heine Boiler Co. (1918) 224 N. Y. 9, 119 N. E. 878.

ported as being proper and reasonable regulation of the relation of employer and employee subject to the legislative power.[15] The Act assumes to extend its extra-territorial effects only to those cases where the contract of hire was made in this state.

In view of the holding of the principal case, cases involving conflicts of remedies are likely to arise. If an employee, under a contract of hire made in California is injured in X state, he can recover compensation in California. Would he also have an action for damages in X state, the place of the injury? It is clear that California cannot by legislation oust the sovereign of the *locus delicti* of its jurisdiction. Nor could the court of the place of injury renounce its common-law jurisdiction by giving effect to a California contract as determined by California law, for, according to the doctrine of the principal case, there would plainly be no "contract" to pay compensation that would be enforceable outside the state. It would seem more desirable in policy to hold that an employee once placed under a system of compensation in this state designed to cover extra-territorial injuries should not be allowed a common-law action against his employer in another state. Whether the state of the place of injury would recognize that the compulsory Act of California creates a relation between employer and employee resembling status and would recognize that status and give effect to California law by refusing to entertain an action for damages seems highly conjectural, though desirable in policy. However, in no case should double recovery be allowed.[16]

In the converse situation where there is a local injury under a foreign contract the California Act should apply. In no case should common-law damages be recoverable in this state. The Workmen's Compensation Act is clearly the declaration of a new policy of the state. It would be properly within the legislative power to prescribe the observance of that declared policy as a condition of the carrying out in this state of a contract of hire made in another state.[17]

Under this construction the system of compensation would cover all injuries within the state regardless of where the contract was made, as well as extra-territorial injuries suffered under contracts of hire made in the state. This would better seem to correspond with the underlying motives of the legislature. The Workmen's Compensation Act is based on a new principle in our law; it is a complete rejection of the older idea of damages. Our Act is mandatory and in lieu of all other recovery. Its language is not that of limitation or restriction, but is all-embracing. In determining the extent of the operation of the Act the courts should

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[15] See Angell, Workmen's Compensation for Injury Abroad, 31 Harvard Law Review, 619, 635, for a previous advocacy of this theory.

[16] See Angell supra, n. 15.

[17] American Radiator Co. v. Rogge (1914) 86 N. J. L. 436, 92 Atl. 85; Douthwright v. Champlin (1917) 91 Conn. 524, 100 Atl. 97; Hagenbeck & Great Wallace Show Co. v. Randall (1920) 126 N. E. 501 (Ind. App.).

not hamper themselves by applying the rules of conflict of laws strictly applicable either to torts or to contracts, but should rather consider the whole matter as a question purely of legislative power and give effect to the dominant purpose of the Act.

T. W. D.

CONFLICT OF LAWS: WHAT LAW GOVERNS COVENANTS FOR TITLE?—Land situated in the state of Washington was conveyed by an instrument executed and delivered in California. The operative words of the deed were, "granted, bargained, sold and conveyed." These words under section 1113 of the Civil Code of California did not imply a covenant of seisin or of right to convey, though such covenants were implied from these words under the law of Washington. In fact, the grantor was not seised and did not have the right to convey. These facts present the question as to what law the court should follow in determining whether or not a covenant exists in the deed. The District Court of Appeal in *Platner v. Vincent*[1] held that the California law should govern. The facts of this case, according to the court's view, did not bring it under the general rule that the law of the state wherein the land is situated controls its descent, alienation, transfer and the effect and construction of conveyances.[2] A different principle of law was adopted in this case, for the reason that the court held, in accordance with authority, that the covenants sought to be implied in the deed, namely, those of seisin and right to convey, were personal in their nature, and did not run with the land as part and parcel of the conveyance. They were covenants *in praesenti*, broken if at all at the moment of their creation.[3] The existence of personal covenants in a deed, the court held, is to be determined by the law of the place where the deed was executed.[4] Personal covenants, according to the traditional doctrine followed by the court, are to be treated as executory contracts and for most purposes governed by the *lex loci contractus*.[5] On the other hand, it was conceded, if the covenants sought to be implied were real in their nature, such as the covenants of warranty or further assurance, the law of Washington would be followed.[6]

As a consequence of the rule announced in the principal case, the existence of implied personal covenants is determined by the law of the place where the deed was delivered, while the interest conveyed by the deed, its formal validity and the meaning of such

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[1] (Oct. 27, 1920) 33 Cal. App. Dec. 407.

[2] McGoon v. Scales, (1869) 76 U. S. (9 Wall.) 23, 19 L. Ed. 545.

[3] Rawle on Covenants for Title, p. 318.

[4] Wharton on the Conflict of Laws, § 276d; 11 Cyc. 1052; Bethell v. Bethell (1876) 54 Ind. 428, 23 Am. Rep. 650.

[5] Minor, Conflict of Laws, § 12.

[6] Minor, Conflict of Laws, § 185; Riley v. Burroughs (1894) 41 Neb. 296, 59 N. W. 929; Fisher v. Parry (1879) 68 Ind. 465; Dalton v. Taliaferro (1901) 101 Ill. App. 592; Succession of Henry Cassidy (1888) 40 La. Ann. 827, 5 So. 292.